

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

COREY LERON THOMPSON,

Defendant-Appellant.

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UNPUBLISHED

January 15, 2015

No. 318694

Huron Circuit Court

LC Nos. 13-305652-FH

13-305653-FH

Before: DONOFRIO, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

In LC No. 13-305652-FH, a jury found defendant guilty of one count of delivering less than 50 grams of heroin, contrary to MCL 333.7401(2)(a)(iv), one count of possessing with intent to deliver less than 50 grams of heroin, contrary to MCL 333.7401(2)(a)(iv), one count of possessing with intent to deliver less than 50 grams of cocaine, contrary to MCL 333.7401(2)(a)(iv), three counts of possession of a firearm during the commission of a felony, third offense (felony-firearm 3rd), contrary to MCL 750.227b, and one count of felon in possession of a firearm, contrary to MCL 750.224f. The trial court sentenced defendant, as a fourth habitual offender, MCL 769.11, to concurrent prison terms of 10 years for the felony-firearm 3rd convictions, and concurrent (but consecutive to the felony-firearm sentences) prison terms of 3 years and 2 months to 20 years for each of the controlled substance convictions, and 1 year and 10 months to 20 years for the felon-in-possession conviction.

In LC No. 13-305653-FH, a jury found defendant guilty of delivering less than 50 grams of heroin, contrary to MCL 333.7401(2)(a)(iv), and the trial court sentenced him, as a fourth habitual offender, to 3 years and 2 months to 20 years' imprisonment, to run concurrently with his felony-firearm sentences in Case No. 13-305652-FH. The trial court further ordered that all of defendant's sentences were to be served consecutive to his existing parole file. For the reasons explained below, we affirm defendant's convictions but remand for resentencing.

I. BACKGROUND

Defendant was arrested after Bad Axe police officers conducted two controlled drug buys from defendant, using an informant who had prior contact with defendant. After the later of the two drug buys, police obtained a warrant to search the apartment where the informant said she had purchased the drugs. The informant said she knew defendant would be at the apartment on

those evenings because he would call her and tell her when he was making trips from Detroit to sell drugs.

The officers returned that night to execute the warrant, and spotted defendant driving away with another person in an SUV. The officers pulled defendant's vehicle over and placed him under arrest. The officers found multiple bags of heroin and cocaine in defendant's vehicle, and within reach of the driver's seat. A subsequent inspection of the vehicle later that evening revealed a loaded handgun underneath the seat behind the driver's seat. The officer who discovered the gun said it was not in plain view, and that he discovered it beneath a covering when he folded up the second row seats to gain access to the vehicle's third row of seats. Defendant's fingerprints were not found on the gun, and the vehicle was not registered in his name.

## II. SUFFICIENCY OF THE EVIDENCE

On appeal, defendant first complains that his felony-firearm and felon-in-possession convictions should be vacated because there was insufficient evidence that he possessed the gun found in the vehicle. This Court reviews sufficiency of the evidence issues de novo. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). "To determine whether the prosecutor has presented sufficient evidence to sustain a conviction, [appellate courts] review the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Smith-Anthony*, 494 Mich 669, 676; 837 NW2d 415 (2013) (citation and internal quotation marks omitted). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowak*, 462 Mich 392, 400; 614 NW2d 78 (2000). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime," *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (citation and internal quotation marks omitted), and "there is absolutely nothing wrong with conviction[s] built on inferences derived from circumstantial evidence," *People v LaFountain*, 495 Mich 968, 969; 844 NW2d 5 (2014) (citation and internal quotation marks omitted). Notably, the prosecutor "is not obligated to disprove every reasonable theory consistent with innocence to discharge its responsibility; it need only convince the jury in the face of whatever contradictory evidence the defendant may provide." *Nowak*, 462 Mich at 400. (citation and internal quotation marks omitted).

"[F]or possessory crimes in Michigan, actual possession is not required; constructive possession is sufficient." *People v Minch*, 493 Mich 87, 91; 825 NW2d 560 (2012). "[A] person has constructive possession if he knowingly has the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons . . . ." *Id.* at 92 (citation and internal quotation marks omitted).

Upon review of the trial record, we find that there was sufficient evidence for a rational trier of fact to find that defendant had constructive possession of the firearm found in his vehicle. At trial, the informant testified to defendant selling her drugs from the apartment building where police officers later observed the vehicle leaving. Officers testified that defendant was the driver of the vehicle and that there was a loaded gun behind his seat. Officers also testified to finding numerous bags of controlled substances in the sunroof of the vehicle, directly above defendant

and within his reach. The officers' and informant's testimony sufficiently established that defendant was a drug dealer and that he had sold drugs on the night the gun was found in the vehicle he was driving.

Defendant contends that this case is analogous to *People v Wolfe*, 440 Mich 508; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201, 1201-1202 (1992), in which the Court held that a defendant's presence in an apartment where a gun was found was insufficient proof that he possessed a firearm during the sale of drugs in the apartment, even where the evidence showed that the defendant had a key to the apartment. *Id.* at 512, 527. In *Wolfe*, the Court noted the absence of evidence showing that the defendant played a role in obtaining the gun, that he made it available during the commission of the felony, or that he reached for it or attempted to use it when the police entered the apartment. *Id.* at 527.

Here, however, the gun was found in closer proximity to defendant and the controlled substances, being located in the same vehicle and directly behind defendant's seat. Moreover, *Wolfe* was decided before the Supreme Court clarified that juries may properly consider the "well-known relationship between drug dealing and the use of firearms as protection". We conclude that the jury's verdicts were supported by sufficient evidence.

### III. RESENTENCING

Next, defendant argues that resentencing is required because the trial court erred in scoring 10 points under offense variables (OVs) 12, 13, and 19. "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.*

Plaintiff argues that defendant waived any error in the trial court's OV scoring because he and his trial counsel stated at the sentencing hearing that they had no corrections to make to the presentence investigation report (PSIR). "Waiver is the intentional relinquishment or abandonment of a known right," and "requires express approval of the trial court's action." *People v Loper*, 299 Mich App 451, 472; 830 NW2d 836 (2013) (citation omitted). "When defense counsel clearly expresses satisfaction with a trial court's decision, counsel's action will be deemed to constitute a waiver." *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011). Here, defendant and his counsel stated at the sentencing hearing that they had "no corrections to make" to the PSIR, but they did not reference its calculation of the OVs and the trial court announced its sentence without discussing them. Neither defendant nor his attorney clearly expressed satisfaction with the trial court's scoring of his OVs. Thus, the issue was not waived. *People v Hershey*, 303 Mich App 330, 334, 351-352; 844 NW2d 127 (2013).

OV 12 is properly scored at 10 points where "[t]wo contemporaneous felonious criminal acts involving crimes against a person were committed," or "[t]hree or more contemporaneous felonious criminal acts involving other crimes were committed." MCL 777.42(1). A felonious criminal act is contemporaneous if "[t]he act occurred within 24 hours of the sentencing offense," and "[t]he act has not and will not result in a separate conviction." MCL 777.42(2)(a).

However, felony-firearm offenses under MCL 750.227b “should not be considered for scoring this variable.” MCL 777.42(2)(b).

OV 13 is properly scored at 10 points where (1) “[t]he offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation of section 7401(2)(a)(i) to (iii) or section 7403(2)(a)(i) to (iii) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403”; or (2) “[t]he offense was part of a pattern of felonious criminal activity involving a combination of 3 or more violations of section 7401(2)(a)(i) to (iii) or section 7403(2)(a)(i) to (iii) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403.” MCL 777.43(1)(d)-(e). As this Court explained in *People v Bemmer*, 286 Mich App 26, 33-34; 777 NW2d 464 (2009):

When determining the appropriate points under this variable, “all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.” MCL 777.43(2)(a). Although MCL 777.43(2)(a) clearly requires a trial court to consider all crimes within a 5-year period, this requirement must be understood in light of MCL 777.43(2)(c), which prohibits a trial court from considering conduct that was scored under MCL 777.41 and MCL 777.42 unless the conduct scored under those statutes was related to “membership in an organized criminal group . . . .” Accordingly, the trial court must generally consider all crimes within a 5-year period except those crimes that were already scored under OV 11 and OV 12.

OV 19 is properly scored at 10 points where “[t]he offender otherwise interfered with or attempted to interfere with the administration of justice.” MCL 777.49(c). “[T]he plain and ordinary meaning of ‘interfere with the administration of justice’ for purposes of OV 19 is to oppose so as to hamper, hinder, or obstruct the act or process of administering judgment of individuals or causes by judicial process.” *Hershey*, 303 Mich App at 343. “It encompasses more than just the actual judicial process and can include [c]onduct that occurs before criminal charges are filed, acts that constitute obstruction of justice, and acts that do not necessarily rise to the level of a chargeable offense . . . .” *Id.* (citation and internal quotation marks omitted). Examples include

providing a false name to the police, threatening or intimidating a victim or witness, telling a victim or witness not to disclose the defendant’s conduct, fleeing from police contrary to an order to freeze, attempting to deceive the police during an investigation, interfering with the efforts of store personnel to prevent a thief from leaving the premises without paying for store property, and committing perjury in a court proceeding. [*Id.* at 344.]

Regarding OV 12, defendant complains that he did not commit any uncharged offenses within 24 hours of the offenses for which he was sentenced. Regarding OV 13, defendant complains that he was not charged with or convicted of any crimes within five years of the

instant offenses,<sup>1</sup> and that his present convictions under MCL 333.7401(2)(a)(iv), MCL 750.227b, and MCL 750.224f were not “crimes against a person of property” or contrary to “section 7401(2)(a)(i) to (iii) or section 7403(2)(a)(i) to (iii) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403.” MCL 777.43(1)(d)-(e). Plaintiff offers no response to any of these arguments.

Neither the PSIR nor the trial court offered any explanation for why OV 12 and 13 should be scored at 10 points. It is therefore necessary to remand for an articulation of the trial court’s scoring decisions. MCL 777.65; *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

Although the trial court did not offer an explanation for scoring OV 19 at 10 points, the PSIR stated that the 10-point score was appropriate because defendant interfered with the administration of justice by failing to cooperate in the presentence investigation review process. Defendant argues that this was an improper basis upon which to score 10 points under OV 19 because he had a constitutional right to remain silent at that time, and therefore had no obligation to willingly participate in the investigator’s preparation of the PSIR. He is correct.

In *People v Wright*, 431 Mich 282, 295; 430 NW2d 133 (1988), our Supreme Court held that a defendant’s Fifth Amendment right against self incrimination continued during the period between conviction and sentencing and attached at a court-ordered psychiatric examination used for sentencing purposes. See also *Estelle v Smith*, 451 US 454, 462-463; 101 S Ct 1866; 68 L Ed 2d 359 (1981) (“We can discern no basis to distinguish between the guilt and penalty phases of respondent’s capital murder trial so far as the protection of the Fifth Amendment privilege is concerned.”). Accordingly, because defendant had a right to remain silent and not incriminate himself during the penalty stage of the proceedings, his decision to exercise those rights by not cooperating with the preparation of the PSIR was not an interference with the administration of justice for purposes of OV 19.

Although plaintiff argues that it was nevertheless proper to score 10 points under OV 19 because defendant lied to police officers inspecting the vehicle he was driving prior to his arrest by telling them that he did not have a gun in the vehicle, it is unclear whether the trial court scored 10 points under OV 19 on that basis, as the trial court provided no explanation for its scoring decision. Further, plaintiff cites no authority permitting this Court to affirm a trial court’s OV scoring determination for reasons that the trial court may not have relied on.

Alternatively, defendant argues by way of supplemental brief<sup>2</sup> that trial counsel was ineffective due to a failure to challenge, and in some instances errant concurrence with, the trial court’s scoring of the above offense variables. We must assume, because there were no specific

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<sup>1</sup> The PSIR notes prior convictions in 1989, 1991, and 2001, but none between 2001 and 2013 (PSIR, 6/11/14, at Criminal Justice section).

<sup>2</sup> Defendant’s motion to file a supplemental brief to address issues of ineffective assistance of counsel was granted by this Court. *People v Thompson*, unpublished order of the Court of Appeals, entered December 26, 2014 (Docket No. 318694).

references to the record in the supplemental brief, that the sentencing errors were those addressed previously in this opinion. Having substantively addressed those issues, we need not review any claims of counsel ineffectiveness in relation to sentencing. To the extent defendant claims any other error of counsel, we decline review in the absence of any particular reference to the record. *Mitcham v City of Detroit*, 355 Mich 182; 94 NW2d 388 (1959). Consequently, defendant fails to show this Court how his counsel's performance was deficient. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

#### IV. DEFENDANT'S STANDARD 4 BRIEF

Defendant also filed a Standard 4 Brief. We have reviewed defendant's arguments in that brief and find them to be meritless and without support in the record.

Affirmed in part, and remanded for resentencing for the reasons explained in this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio  
/s/ Stephen L. Borrello  
/s/ Cynthia Diane Stephens